74

54390 B

(10)

42pgs

FILED
NOV 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1082

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DAVID LEE MOORE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, IDAHO, MICHIGAN, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WYOMING AS *AMICI CURIAE* ON BEHALF OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General for Criminal Justice

R. TED CRUZ
Solicitor General
Counsel of Record

SUSANNA DOKUPIL
ADAM W. ASTON
Assistant Solicitors General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

Additional counsel listed on inside cover

Troy King
Attorney General of Alabama

Terry Goddard
Attorney General of Arizona

Dustin McDaniel
Attorney General of Arkansas

John W. Suthers
Attorney General of Colorado

Bill McCollum
Attorney General of Florida

Lawrence G. Wasden
Attorney General of Idaho

Michael A. Cox
Attorney General of Michigan

Jim Hood
Attorney General of Mississippi

Catherine Cortez Masto
Attorney General of Nevada

Kelly A. Ayotte
Attorney General of New Hampshire

W.A. Drew Edmondson
Attorney General of Oklahoma

Hardy Myers
Attorney General of Oregon

Thomas W. Corbett, Jr.
Attorney General of Pennsylvania

Roberto J. Sanchez Ramos
Secretary of Justice
Commonwealth of Puerto Rico

Henry D. McMaster
Attorney General of South Carolina

Lawrence E. Long
Attorney General of South Dakota

Mark L. Shurtleff
Attorney General of Utah

Bruce A. Salzburg
Attorney General of Wyoming

QUESTION PRESENTED

Does the United States Constitution require the suppression of evidence obtained when a police officer makes an arrest based upon probable cause, if the arrest violates a provision of state law?

TABLE OF CONTENTS

Question Presented ii

Table of Contents iii

Table of Authorities vi

Interest of *Amici* 1

Summary of Argument 1

Argument 2

I. The Fourth Amendment Permitted the Arrest—and Thereby the Search—Because It Was Based on Probable Cause 2

A. The Constitution Permits Arrest for Minor Offenses, Such as Driving With a Suspended License, When Based on Probable Cause .. 3

B. A Search Incident to a Lawful Custodial Arrest Is Constitutional 4

C. The Virginia Supreme Court Erred in Relying on *Knowles v. Iowa* 5

1. *Knowles* is inapposite both in its reasoning and on its facts 6

2. Under the Fourth Amendment, the arrest itself, not the type of offense, justifies the search 7

II. State Law Prohibiting Arrest Cannot Defeat Constitutional Probable Cause Under the Fourth Amendment 10

A. A State Law Cannot Diminish the Fourth Amendment's Probable Cause Standard .. 11

B. State Law Cannot Expand, as a Matter of Federal Constitutional Law, the Fourth Amendment's Probable Cause Standard .. 12

C. The Court Has Held That State Law Does Not Determine the Constitutionality of an Arrest 14

III. Upholding the Virginia Supreme Court's Decision Would Have Profound Consequences 15

A. The Virginia Court's Interpretation Disturbs the Certainty and Uniformity that Have Served as a Basis for the Court's Fourth-Amendment Jurisprudence 15

B. If a Violation of State Law Requires a Constitutional Remedy, the Availability of That Remedy Would Vary State-to-State, Creating Anomalies Between States and in Application of the Court's Precedents 21

1. If a violation of state law requires a constitutional remedy, results in subsequent cases could conflict with the Court's precedents 22

2. The varied state-law approaches to misdemeanor arrests should—and often do—have state-crafted remedies 24

IV. The Probable Result of Moore's Proposed Rule Would Be Less Protection for Individuals Than is Currently Provided by the States 27

Conclusion 29

TABLE OF AUTHORITIES

Cases

Arkansas v. *Sullivan*, 532 U.S. 769 (2001) 2, 13

Atwater v. *City of Lago Vista*,
532 U.S. 318 (2001) ..... *passim*

Brinegar v. *United States*,
338 U.S. 160 (1949) 16

California v. *Greenwood*,
486 U.S. 35 (1988) 11, 13, 14, 16

City of Kettering v. *Hollen*,
416 N.E.2d 598 (Ohio 1980) 26

Coolidge v. *New Hampshire*,
403 U.S. 443 (1971) 12

Cooper v. *California*, 386 U.S. 58 (1967) 11

Drewitt v. *Pratt*, 999 F.2d 774 (CA4 1993) 19

Elkins v. *United States*,
364 U.S. 206 (1960) 11, 14, 16

Gustafson v. *Florida*, 414 U.S. 260 (1973) 2, 8, 9

Hudson v. *Michigan*,
126 S.Ct. 2159 (2006) 20, 21, 27, 28

Illinois v. *Lafayette*, 462 U.S. 640 (1983) 10

Knowles v. *Iowa*, 525 U.S. 113 (1998) 6-10

Maine v. *Jolin*, 639 A.2d 1062 (Me. 1994) 19

Maryland v. *Pringle*, 540 U.S. 366 (2003) 3

Michigan v. *DeFillippo*, 443 U.S. 31 (1979) 4, 14

New York v. *Belton*, 453 U.S. 454 (1981) 23

Oregon v. *Hass*, 420 U.S. 714 (1975) 13

People v. *McKay*, 41 P.3d 59 (Cal. 2002) 20, 26

People v. *Wolf*, 635 P.2d 213 (Colo. 1981) 19

State v. *Jolin*, 639 A.2d 1062 (Me. 1994) 26

Texas v. *Brown*, 460 U.S. 730 (1983) 15

Thornton v. *United States*,
541 U.S. 615 (2004) 2, 9, 23

United States v. *Caceres*,
440 U.S. 741 (1979) 28

United States v. *Calandra*,
414 U.S. 338 (1974) 20

United States v. *Di Re*, 332 U.S. 581 (1948) 14, 21

United States v. *Jones*, 185 F.3d 459 (CA5 1999) ... 19

United States v. *Knights*,
534 U.S. 112 (2001) 27

United States v. *Robinson*,
414 U.S. 218 (1973) 2, 4, 5, 8, 9

Virginia v. *Moore*, 636 S.E.2d 395 (2006) 5-7, 9, 12

Washington v. *Chrisman*, 455 U.S. 1 (1982) 8, 9

Whren v. *United States*, 517 U.S. 806 (1996) 2, 27

Statutes, Rules, and Constitutional Provisions

U.S. CONST. amend. IV 27

21 U.S.C. §844 17

21 U.S.C. §844a 17

ALA. CODE §32-1-4(a)-(b) 25

ALA. CODE §32-1-4(c) 25

ALA. STAT. §32-5B-5 23

ARIZ. REV. STAT. §28-909(C) 22

CAL. PENAL CODE §853.6(i) 25

CAL. VEH. CODE §40504 25

D.C. CODE §23-581(a)(1)(iv) 25

KAN. STAT.§22-2401(d) 24

KY. REV. STAT. §431.015(1) 24

KY. REV. STAT. §431.015(2) 24

LA. REV. STAT. §32:57(C) 18

LA. REV. STAT. §32:57(E)(2) 18

LA. REV. STAT. §32:295.1(F) 23

LA. REV. STAT. §32:391 24

MD. TRANSP. CODE §26-202 24

MINN. R. CRIM. PROC. 6.01, subd. 1(1)(a) 24

N.Y CRIM. PRO. LAW §150.75 17

N.Y. PENAL LAW §221.05 17

N.Y. PENAL LAW §221.10 17

NEB. REV. STAT. §29-404.02(1)(b)(4) 25

NEB. REV. STAT. §28-416(13)(a) 17

OR. REV. STAT. §810.401(3)(a) 24

S.D. Codified Laws §32-33-2 24

SUP. CT. R. 37.4 1

TENN. CODE §40-7-118(b)(1) 24

TEX. HEALTH & SAFETY CODE §481.121(b) 17

TEX. TRANSP. CODE §543.004(a)(1) 24

VA. CODE §46.2-301(C) 4, 5

VA. CODE §46.2-936 25

VA. CODE §18.2-95 18

VA. CODE §18.2-96 18

VA. CODE §19.2-74 ..... 18, 28

VT. R. CRIM. P. 3(b) 25

WYO. STAT. ANN. §7-2-102(b)(i) 25

INTEREST OF *AMICI*

The *amici* States appear as *amici curiae* in support of Petitioner, Commonwealth of Virginia. SUP. CT. R. 37.4.

The *amici* States have a strong interest in effective and efficient law-enforcement practices that comply with all federal constitutional mandates. Given the significant number of arrests and searches that occur each year, the States have a particular interest in a clear and uniform Fourth Amendment standard. The Court's definition of probable cause provides that standard.

Additionally, the States have an interest in retaining their flexibility to regulate their own law-enforcement procedures. If the States choose to do so, the Constitution permits them to provide their citizens with protections above and beyond those embodied in the Fourth Amendment. Concurrent with the ability to create new protections, the States are also permitted to craft the remedies for violations of these state protections. In this way, the States are able to maintain the criminal procedures that best serve each State's particular needs.

SUMMARY OF ARGUMENT

Nothing in the Court's Fourth Amendment jurisprudence prohibited Virginia's officers from arresting David Lee Moore, and then from searching him incident to that arrest. To the contrary, the Court has consistently held that an arrest based on probable cause, even for a minor traffic violation, does not violate the Fourth Amendment. Nor does a search incident to arrest.

States are permitted to provide protections in addition to those the Court has held that the Fourth Amendment requires. But when they do, any violation of such state law does not independently violate the Fourth

Amendment. Instead, the remedy for a violation of that protection must be found in state law. If the Fourth Amendment's exclusionary rule were expanded to cover state-law violations, then state legislatures and supreme courts would have the power to define the federal Constitution, a proposition this Court has expressly rejected. Because the Fourth Amendment did not preclude the challenged arrest, neither should it provide the remedy.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITTED THE ARREST—AND THEREBY THE SEARCH—BECAUSE IT WAS BASED ON PROBABLE CAUSE.

The parties agree that the officers had probable cause to stop Moore's car for a traffic violation. *See, e.g.*, *Whren* v. *United States*, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable when the police have probable cause to believe that a traffic violation has occurred."). Indeed, the Court has long held that the Fourth Amendment poses no general bar to searches incident to lawful arrests for traffic violations.[1] Thus, but for the Virginia statute, Moore would have no plausible challenge to the constitutionality

---

1. *See, e.g.*, *Thornton* v. *United States*, 541 U.S. 615, 621 (2004) (allowing search of an automobile compartment incident to the driver's arrest for license tags issued to a different car); *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (noting an officer's authority to arrest "for a fine-only traffic violation (speeding)"); *Gustafson* v. *Florida*, 414 U.S. 260, 266 (1973) (upholding a search incident to arrest for driving without a valid license); *United States* v. *Robinson*, 414 U.S. 218, 220 (1973) (finding constitutional a search incident to arrest for driving with a revoked license).

of his search. But violating a state statute is not the same as violating the Constitution, and Moore cannot convert a simple state-law violation into a constitutional one.

A. The Constitution Permits Arrest for Minor Offenses, Such as Driving With a Suspended License, When Based on Probable Cause.

The Fourth Amendment permitted the officers to arrest Moore for driving with a suspended license. The Court has held that the arrest of a driver for a minor traffic offense does not violate the Fourth Amendment. In *Atwater* v. *City of Lago Vista*, a woman violated a law requiring her and her passengers to wear seatbelts. 532 U.S. 318, 323-24 (2001). An officer stopped and arrested her, and she challenged the arrest as an "unreasonable seizure." *Id.*, at 325. The Court concluded, based on the original understanding and history of the Fourth Amendment, that a warrantless arrest for a misdemeanor committed in the officer's presence was not unconstitutional: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.*, at 354.

Moore's arrest for driving with a suspended license is constitutionally indistinguishable from Atwater's. Moore committed a minor traffic violation in the presence of an officer, and he was arrested. Just as the Fourth Amendment did not preclude Atwater's arrest, neither does it preclude Moore's. *See Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for . . . a misdemeanor committed in the officer's presence[] is consistent with the

Fourth Amendment if the arrest is supported by probable cause.").

The only difference between Moore's arrest and Atwater's concerns state law, namely that the seatbelt law in *Atwater* specifically permitted the officers to arrest, 532 U.S., at 323, and the statute in this case specifically prohibited it, VA. CODE §46.2-301(C). This distinction, however, is not constitutionally significant. *Atwater* held that an arrest such as Moore's is consistent with the Fourth Amendment. As such, the search incident to that arrest must also be constitutional.

B. A Search Incident to a Lawful Custodial Arrest Is Constitutional.

The Court's precedents are unequivocal that a search incident to a lawful custodial arrest, even for a minor crime, is constitutional. "The fact of a lawful arrest, standing alone, authorizes a search." *Michigan* v. *DeFillippo*, 443 U.S. 31, 35 (1979). In *United States* v. *Robinson*, the Court created a bright-line rule that all warrantless searches of a person incident to a lawful custodial arrest satisfy the Fourth Amendment, noting that "the fact of the lawful arrest . . . establishes the authority to search," and "in the case of a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." 414 U.S. 218, 235 (1973).

Robinson involved an arrest virtually identical to the arrest at issue here. In *Robinson*, an officer had probable cause to stop a driver for operating a vehicle after the revocation of his permit. 414 U.S. 218, 220 (1973). The

officer effected a custodial arrest, searched the driver's person, and found heroin. *Id.*, at 221-22. Similarly, in this case, officers stopped a driver for operating on a suspended license, effected a full custodial arrest, complete with *Miranda* warnings, searched Moore, and found "approximately 16 grams of crack cocaine" which "[h]e admitted . . . was his." *Virginia* v. *Moore*, 636 S.E.2d 395, 396 (2006); VA. CODE §46.2-301(C).

The only distinction between this case and *Robinson* is that the statute in *Robinson* required an arrest. *See United States* v. *Robinson*, Brief of Respondent, 1973 WL 172612, at *5 (1973). But the Court held in *Gustafson* v. *Florida*, a case decided on the same day as *Robinson*, that it did not "find these differences determinative of the constitutional issue." 414 U.S. 260, 265 (1973). *Gustafson* stated that "[i]t is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest, and placed the prisoner into custody." *Id.*, at 265. If the Fourth Amendment allows a search incident to a lawful custodial arrest, and the arrest is constitutionally lawful, then the search is also constitutional. *Id.*, at 267 (Stewart, J., concurring) (noting that if the custodial arrest was constitutional, "it follows that the incidental search of his person was also constitutionally valid" under *Robinson*).

C. The Virginia Supreme Court Erred in Relying on *Knowles v. Iowa*.

Moore's arrest violated a Virginia law that required police only to issue a summons. VA. CODE §46.2-301(C). This fact, though significant under Virginia law, cannot render an otherwise-constitutional search unreasonable.

The Virginia Supreme Court concluded, however, that the officers' state-law violation required a federal constitutional remedy. It held that because Moore's arrest was unlawful under state law, the officers lacked probable cause to search incident to that arrest. *Moore*, 636 S.E.2d, at 400. In reaching that conclusion, the Virginia Supreme Court relied heavily on the Court's decision in *Knowles* v. *Iowa*, 525 U.S. 113, 118-19 (1998), which "forbids expansion of the search incident to arrest exception to include a search incident to citation." *Moore*, 636 S.E.2d at 398.

1. *Knowles* is inapposite both in its reasoning and on its facts.

The Virginia Supreme Court's broad reading of *Knowles* does not withstand scrutiny. Unlike this case, in which the statute precluded arrest, the challenged Iowa statute authorized police either to arrest or issue a citation for speeding. *Knowles*, 525 U.S., at 114. Presumably, an officer could have probable cause to search incident to a lawful arrest under the statute. *See id.*, at 116 (declining to decide whether the statute could ever be lawfully applied). But, the officer searching incident to citation in *Knowles conceded* that he lacked either probable cause or consent to search incident to the citation. *Id.*, at 114-15. Rather, he relied solely on the Iowa Supreme Court's interpretation of state law to justify the search. *Id.*, at 115-16. It is that interpretation—that an officer may search incident to a traffic citation—that the Court reversed. *Id.*, at 116.

Knowles, then, presents the inverse of the question raised here. In *Knowles*, an otherwise-unconstitutional search was purported to be made legal by state law. In

Moore, an otherwise-constitutional search is being claimed to have been made illegal by state law. The *Knowles* Court held that a search incident to citation was unconstitutional and could not be legitimized by Iowa law. It did not even address—much less demonstrate—that an otherwise-constitutional arrest can be rendered unconstitutional by state law.

Even if *Knowles* stands for the proposition that all searches incident to citation are unconstitutional, that would not control this case. *Knowles* differs on its facts from *Moore* in another critical regard: Knowles was never arrested. He was stopped for speeding, issued a citation, and searched. *Knowles*, 525 U.S., at 114. Moore, by contrast, was arrested and read his *Miranda* warnings before he was searched. *Moore*, 636 S.E.2d, at 396. Thus, Moore's search was incident not to a citation, but to a full custodial arrest.

2. Under the Fourth Amendment, the arrest itself, not the type of offense, justifies the search.

Once the officer makes an arrest, even contrary to state law, the rationales justifying a search incident to arrest prevail. Under *Knowles*, if an officer has a choice between arrest and citation, but chooses citation, he loses the ability to search incident to that citation. *Knowles* declined to extend the search-incident-to-arrest exception to the warrant requirement to citations on the grounds that the rationales underlying that exception—"the need to disarm the suspect" and "the need to preserve evidence"—were not present. *Id.*, at 117. But where the arrest meets the threshold protections of probable cause

under the Fourth Amendment, then those rationales persist, even if the arrest violates state law.

The officer's relationship to the arrestee, not the nature of the arrestee's offense, is what justifies the search. "[I]t is the fact of the custodial arrest which gives rise to the authority to search," even if the officer has no "subjective fear" or suspicion that the arrestee "was armed." *Gustafson*, 414 U.S., at 266. "Every arrest must be presumed to present a risk of danger to the arresting officer." *Washington* v. *Chrisman*, 455 U.S. 1, 7 (1982). Indeed, "an arresting officer's custodial authority over an arrested person does not depend on a reviewing court's after-the-fact assessment of the particular arrest situation." *Id.* The officer does not even need to articulate his reasons for looking for weapons or evidence: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* (citing *Robinson*, 414 U.S., at 235).

Knowles agrees. The *Knowles* opinion explains at length that the custodial arrest situation differs dramatically from the citation situation. Arrest involves "extended exposure" to the suspect, and the danger "flows from the fact of the arrest and its attendant proximity, stress, and uncertainty, *and not from the grounds for the arrest.*" *Knowles*, 525 U.S., at 117 (quoting *Robinson*, 414 U.S., at 234-35 & n.5) (emphasis added). *Knowles* itself, then, highlights the importance of the link between the

fact of arrest and the constitutionality of the incident search.

The *Knowles* Court found the search incident to citation constitutionally infirm because it lacked the justifications present in a full custodial arrest. *Id.*, at 117. But Moore was, in fact, arrested. Thus, the officer's search was justified by the need to disarm and preserve evidence. *See Gustafson*, 414 U.S., at 266.

Here, the length of time Moore was with the officers further justifies the search. The officers arrested Moore and had him in custody, but "[b]ecause of a 'miscommunication' between the officers, they did not search Moore at the time he was arrested." *Moore*, 636 S.E.2d, at 396. They first took him to his hotel room, which Moore had expressly granted consent to search. *Id.* Regardless of when the officers searched Moore, the length of time required to travel to the hotel room and search it is the very same "extended exposure" to the suspect against which *Robinson* tried to protect. *See Robinson*, 414 U.S., at 234-35. As the *Chrisman* Court noted, "[t]here is no way for an officer to predict reliably how a particular suspect will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious." *Chrisman*, 455 U.S., at 7; *see also Thornton*, 541 U.S., at 621 (explaining that an "officer faces a highly volatile situation" when making an arrest during a traffic stop, whether or not the arrestee is in his vehicle). *Robinson*'s rationale justifying the search incident to arrest therefore applies equally to the officers in *Moore*.

The availability of other avenues for ensuring officer safety, *see, e.g.*, *Knowles*, 525 U.S., at 117-18, may demonstrate that a search incident to citation is unnecessary, but they do not suggest that, under the Fourth Amendment, a search incident to an arrest—even a wrongful one under state law—is unconstitutional. "The reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983).

The very fact of Moore's arrest, therefore, justifies the incident search. The arrest, in turn, was founded on probable cause because the police observed Moore committing an offense. Nothing in the Constitution itself or in the Court's precedents compels the conclusion that the police violated Moore's rights under the Fourth Amendment. To the contrary, they demonstrate that Moore's arrest and search were constitutionally sound.

II. State Law Prohibiting Arrest Cannot Defeat Constitutional Probable Cause Under the Fourth Amendment.

The search of Moore met all federal constitutional mandates. *See* Part I, *supra*. Only because Virginia law forbade arrest for the particular type of traffic violation committed here is the constitutionality of the search in question. The Virginia Supreme Court concluded that the statute negates probable cause—that is, because the officer only had discretion to issue a citation, he also lacked constitutional discretion to search. But, the practical effect of the Virginia Court's rule would be to allow state law to dictate the parameters of the Fourth Amendment. The Court has rejected this view, holding

that state law may provide protections above and beyond those granted by federal law, but it may not define the parameters of federal law itself. *California* v. *Greenwood*, 486 U.S. 35, 43 (1988) ("We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."); *Elkins* v. *United States*, 364 U.S. 206, 224 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers, ... [t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.").

Moreover, state-law authorization for police activity is not by itself determinative of that activity's constitutionality: "Just as a search authorized by state law may be justified as a constitutionally reasonable one under [the Fourth A]mendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Cooper* v. *California*, 386 U.S. 58, 61 (1967). Indeed, "when such state standards [imposing higher standards than required by the federal Constitution] alone have been violated, the State is free, without review by us, to apply its own state . . . rule to such errors of state law." *Id.*, at 62. Therefore, the relevant federal question is not whether the search violated state law, but whether the search was constitutionally reasonable in and of itself.

A. A State Law Cannot Diminish the Fourth Amendment's Probable Cause Standard.

States may not use their own laws to legitimize practices that fail to provide citizens with the federal

rights the Court has defined. The Court rejected a State's attempt to define constitutional protections through state law in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). There, the State's Attorney General signed warrants authorizing the search of a suspect's automobile. *Id.*, at 447. The Court held that the state law authorizing this practice was unconstitutional: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Id.*, at 449. Because the Attorney General "was not the neutral and detached magistrate required by the Constitution," the warrant he signed was constitutionally invalid. *Id.*, at 453. Thus, a State's laws must, at a minimum, offer its citizens the same protection against unreasonable searches and seizures that the Constitution provides.

B. State Law Cannot Expand, as a Matter of Federal Constitutional Law, the Fourth Amendment's Probable Cause Standard.

Likewise, state law cannot create additional federal constitutional protections beyond what the Court's precedents require. The Virginia Supreme Court has concluded, erroneously relying on *Knowles*, that if state law allows the officers to issue only a summons, then that state statute "negates . . . the existence of probable cause" to arrest. *Moore*, 636 S.E.2d, at 724. The Virginia Supreme Court, however, lacks the authority to extend *Knowles*'s holding that far. As explained above, the Court's precedents pose no bar to arrest for minor traffic offenses. *See* Part I.A, *supra*. The Virginia Supreme Court, in extending *Knowles*, has used a state statute

precluding arrest to deny constitutional probable cause where the Constitution itself has not done so.

In essence, the Virginia Supreme Court is interpreting the United States Constitution to provide greater protections than the Court's precedents. This it cannot do. The Court has thrice foreclosed that argument, in *Oregon* v. *Hass*, 420 U.S. 714 (1975), in *Arkansas* v. *Sullivan*, 532 U.S. 769 (2001), and in *Greenwood*, 486 U.S., at 43-44. In each case, state supreme courts attempted to "'interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court,'" and the Court found that was "'not the law and surely must be an inadvertent error.'" *Sullivan*, 532 U.S., at 772 (quoting *Hass*, 420 U.S., at 719 n.4). The Court responded each time that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions *as a matter of federal constitutional law* when this Court specifically refrains from imposing them." *Sullivan*, 532 U.S., at 772 (quoting *Haas*, 420 U.S., at 719).

Under this standard, the Virginia Supreme Court improperly used state law to define the Constitution. Its decision to expand the protection of *Knowles* beyond cases in which the officer had authority to arrest—and did not—to cases in which the officer had no authority to arrest—and did—places its own state statutes in a position to define Supreme Court precedent. To say that the Virginia Court has merely interpreted its law in light of *Knowles* is no answer. As explained above, *Knowles* neither controls nor addresses the specific facts here, and

its own facts and reasoning simply do not support the extension of its holding to this case.

C. The Court Has Held That State Law Does Not Determine the Constitutionality of an Arrest.

As *Coolidge* and *Knowles* explain, an otherwise-unconstitutional arrest cannot be made constitutional by an operation of state law. But the Court has gone even further, holding that a constitutional arrest and search—pursuant to an unconstitutional state law—is nonetheless constitutional.

In *Michigan* v. *DeFillippo*, the Court held that an officer had probable cause to arrest and search a suspect for violating a city ordinance in front of him, even though that ordinance was later declared constitutional. 443 U.S. 31, 40 (1979).[2] The Court noted that "there was abundant probable cause to satisfy the constitutional prerequisite for an arrest," *id.*, at 37, even though the ordinance itself was later held unconstitutionally vague. *Id.*, at 38. *DeFillippo* explained that "the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes . . . which purported to authorize the

---

2. *DeFillippo* noted in dictum that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." 443 U.S., at 36. Yet, *DeFillippo* did not present the question of an arrest pursuant to a state-law violation. *Id.*, at 36 ("Respondent does not contend . . . that the arrest was not authorized by Michigan law."). Rather, the case turned on the presence of probable cause, which is not disputed here. *Id.*, at 37-40. Similarly, *United States* v. *Di Re*, 332 U.S. 581, 593-95 (1948), approved suppression of the fruits of a search incident to an arrest that violated a New York statute, but that case has since been implicitly overruled. *See, e.g., California* v. *Greenwood*, 486 U.S. 35, 43 (1988); *Elkins* v. *United States*, 364 U.S. 206, 223-24 (1960).

searches in question without probable cause and without a valid warrant." *Id.* This reasoning is consistent with the holding in *Knowles*—that a state statute cannot legitimize an unconstitutional search. Likewise, the *DeFillippo* holding recognized that a statute's later invalidation cannot retroactively invalidate an otherwise-constitutional search. Here, as in *Knowles*, the underlying rationale for the holding is that probable cause does not turn on state statutory grounds. Rather, it is an independent constitutional inquiry.

III. UPHOLDING THE VIRGINIA SUPREME COURT'S DECISION WOULD HAVE PROFOUND CONSEQUENCES.

The Virginia Supreme Court's interpretation of the Fourth Amendment's application in this case would lead to startling results. Whereas the established standard of requiring only probable cause prior to an arrest and search provides clarity, certainty, and uniformity—hallmarks of the Court's Fourth Amendment jurisprudence—looking to individual state laws to provide the basis for searches permitted under the Fourth Amendment would introduce uncertainty and disparity into this settled area of law.

A. The Virginia Court's Interpretation Disturbs the Certainty and Uniformity that Have Served as a Basis for the Court's Fourth-Amendment Jurisprudence.

The Fourth Amendment's probable-cause standard provides a clear, readily-applicable rule for law enforcement officers. *See Texas* v. *Brown*, 460 U.S. 730, 742 (1983) ("[P]robable cause is a flexible, commonsense

standard."); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949) ("[T]he rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement."). The Virginia court's approach, however, would require—as a matter of federal constitutional law—both probable cause *and* compliance with all applicable state laws in order for a search to be permissible. But the Court "ha[s] never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *California* v. *Greenwood*, 486 U.S. 35, 43 (1988); *see also Elkins* v. *United States*, 364 U.S. 206, 223-24 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers . . . [t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."). And for good reason: the probable-cause standard provides uniformity and clarity; in contrast, a state-by-state, law-by-law inquiry promotes confusion and disparity, *see Atwater*, 532 U.S., at 347 ("[W]e have traditionally recognized that a reasonable Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."). Several examples demonstrate the confusion that could flow from allowing state law to define federal constitutional violations:

1. Situations in Which the Legality of an Arrest Under State Law is Not Immediately Determinable. There are a

number of scenarios in which law-enforcement officers might witness conduct that is both (1) clearly *illegal* under state law (and, thus, provides probable cause) and (2) not clearly conduct for which state law permits arrest. The Court noted a similar problem in *Atwater*. After recognizing that bright-line rules are commonplace in the Court's Fourth Amendment jurisprudence, the Court rejected Atwater's suggestion to draw a line between "'jailable' and 'fine-only' offenses, between those for which conviction could result in commitment and those for which it could not." *Id.*, at 347-49. The Court explained that "[t]he trouble with this distinction, of course, is that an officer on the street might not be able to tell [because] penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest." *Id.*, at 348. The same difficulty arises with respect to illegal conduct for which the legality of an arrest depends on the degree of the conduct.

One example is in the context of drug possession. As noted in *Atwater*, both the United States and Texas have laws making possession of one amount of a controlled substance a jailable offense, but the possession of a lesser amount a fine-only offense. *Id.*, at 349 n. 19 (citing 21 U.S.C. §§844, 844a; TEX. HEALTH & SAFETY CODE §481.121(b)). States have similar statutes with respect to the arrest-versus-citation distinction. *See, e.g.*, NEB. REV. STAT. §28-416(13)(a) (permitting arrest for more than one ounce of marijuana and requiring citation for less than one gram); *cf.* N.Y. PENAL LAW §§221.05, 221.10 (Posession of less than 25 grams of marijuana is a "violation" and possession of more than 25 grams is a misdemeanor.); N.Y CRIM. PRO. LAW §150.75 (A defendant arrested, without a warrant, for possession of marijuana is to be issued an

"appearance ticket") (New York case law is mixed as to whether this statute permits an arrest, and thereby permits a search). Under the Virginia Court's rule, the arresting officer would be required to determine the precise amount of a controlled substance the offender possessed prior to the arrest and search; otherwise—despite the probable cause clearly present at the time of arrest—a later determination that the amount possessed was insufficient to arrest under state law would require the exclusion of evidence obtained during the search.

Another example is in the context of theft. In Virginia, theft of an item worth less than $200 is a Class 1 misdemeanor, VA. CODE §18.2-96, for which an arrest is prohibited, *id.* §19.2-74. Theft of an item worth more than $200 is a felony, for which an arrest is permitted. VA. CODE §18.2-95. As the value of a stolen item may not be readily ascertainable at the scene, an officer who has probable cause to arrest might later find out that the arrest violated state law. Regardless how the State may choose to address that violation of state law when it is discovered, the probable cause—which is the Fourth Amendment's only requirement—existed at the time of the arrest, making the search constitutionally permissible. Not so under the Virginia court's approach.

Laws against speeding provide an example in the traffic-violation context. In Louisiana, an arrest is permitted for speeding if the driver is traveling more than fifteen miles-per-hour over the limit. LA. REV. STAT. §§32:57(C), (E)(2). Thus, an officer who clocks a driver traveling more than fifteen miles-per-hour over the limit would have probable cause to arrest and search the driver.

Although the driver may later challenge the accuracy of the radar gun used, and he may in fact demonstrate that he was traveling at a speed at which the arrest was impermissible under Louisiana law, that cannot defeat the probable cause that existed at the scene permitting the search.

In each of these examples, and there are countless others, the illegality of the *conduct* would not be in dispute. Thus, probable cause would plainly exist under the Fourth Amendment. It is only the legality of the *arrest* under state law that might be questioned, or even disproved, at a later date. Requiring the application of the exclusionary rule to these circumstances—where probable cause most certainly existed at the time of arrest—would inject considerable uncertainty into the Court's Fourth Amendment jurisprudence.

2. Technical Deficiencies in the Arrest. There are many technical deficiencies with respect to a particular arrest that might violate state law. For example, an officer may effect an arrest outside of his territorial limits,[3] a non-uniformed arresting officer may fail to properly identify himself,[4] or an officer's commission may be defective.[5] The

---

3. *See, e.g., Maine* v. *Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (refusing to apply a *per se* rule that evidence obtained during an arrest effected by an officer outside her territorial jurisdiction is to be excluded); *People* v. *Wolf*, 635 P.2d 213, 217-18 (Colo. 1981) (denying a motion to suppress "[d]espite the fact that the Denver police violated the statutes governing their authority to arrest").

4. *See, e.g., Drewitt* v. *Pratt*, 999 F.2d 774, 777 (CA4 1993) (officer's failure to display a badge, in violation of Virginia law, "did not rise to a violation of a federal constitutional magnitude").

5. *See, e.g., United States* v. *Jones*, 185 F.3d 459, 462-63 (CA5 1999).

Fourth Amendment was not adopted to address minor violations of state arrest laws. *See Atwater*, 532 U.S., at 339-40 ("[T]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers.") (internal citation omitted). Nevertheless, the Virginia court's approach would require the exclusionary rule be applied to evidence obtained during these searches. As these minor state-law deficiencies are wholly unrelated to the question whether the arresting officer had probable cause, they do not give rise to Fourth Amendment violations. To require, as a matter of federal constitutional law, the application of the exclusionary rule for these defects would be inappropriate. *See Hudson* v. *Michigan*, 126 S.Ct. 2159, 2163 (2006) (explaining that the exclusionary rule is "applicable only 'where its remedial objectives are thought most efficaciously served'") (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)); *see also People* v. *McKay*, 41 P.3d 59, 69 (Cal. 2002) ("What good would be gained, after all, by invoking the federal Constitution to exclude evidence seized following an arrest merely because, in violation of state law, a nonuniformed police officer failed to display a badge . . . . Constitutionalizing the myriad of technical state procedures that govern arrests would not only trivialize Fourth Amendment protections but would discourage states from even enacting such rules").

In each of these examples, the Virginia court's approach would require the officer to conclusively determine whether an arrest is permissible under state law prior to an arrest and search. If the officer did not

accurately make this often-difficult determination at the scene, the Virginia court would require the application of the exclusionary rule to evidence collected during a search, despite the clear probable cause. The Constitution does not require—and the need for a bright-line rule to guide law-enforcement officers counsels against—such an approach. As the Court has explained, a particular search or seizure is constitutional, or not, at its outset; a search that began without probable cause cannot become constitutional if the officers establish probable cause during the search. *See Di Re*, 332 U.S., at 228-29. But this necessarily also means that a search that began with the constitutionally-required probable cause cannot be rendered unconstitutional because it is discovered, after the fact, that an arrest violated a particular state law.

For the Court to hold that a violation of a state arrest statute is a violation of the Fourth Amendment—and thereby requires the "massive remedy" of the exclusion of evidence, *Hudson,* 126 S.Ct., at 2166—"would generate a constant flood of alleged failures to observe [state] rule[s]. . . . The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card," *id.*

B. If a Violation of State Law Requires a Constitutional Remedy, the Availability of That Remedy Would Vary State-to-State, Creating Anomalies Between States and in Application of the Court's Precedents.

If Moore and the Virginia Supreme Court are correct, state legislatures could create fifty different standards for when the exclusionary rule is required. While it is altogether fitting and proper for state laws to vary, the

Constitution should have a uniform interpretation and application. In tying a federal constitutional remedy to a state-law violation, Moore's position not only creates conflicts in the application of the Court's precedents, but also curtails the States' freedom to craft their own remedies, devaluing States' rights to develop individual methods of dealing with state-law violations.

1. If a violation of state law requires a constitutional remedy, results in subsequent cases could conflict with the Court's precedents.

The Court's precedents, like its interpretation of the Constitution itself, should have a uniform application across all fifty States. If state laws may redefine what constitutes a Fourth Amendment violation, however, then the Court could face interpretations of the Fourth Amendment under state law that directly conflict with its own prior precedents.

Atwater, for example, would come out differently based on differing state laws governing arrests for seatbelt usage. In Arizona, state law requires seatbelt usage but prevents officers from "stop[ping] or issu[ing] a citation to a person operating a motor vehicle on a highway in this state for a violation of this section unless the peace officer has reasonable cause to believe there is another alleged violation of a motor vehicle law of this state." ARIZ. REV. STAT. §28-909(C). If Moore's proposed rule were adopted, then an officer's stopping and arresting a person in Arizona for failing to wear a seatbelt would violate the Fourth Amendment. But, the very same arrest in Texas would comply with the Fourth Amendment under *Atwater*. Evidence found in a search incident to the Arizona arrest

would be suppressed, while in Texas it would be admitted. Drivers in Arizona would enjoy greater protections *under the federal Constitution* than drivers in Texas.

In Alabama, the same arrest would prove even more confusing. Alabama law provides that a violation of seatbelt law "shall not constitute probable cause for the search of the vehicle involved." ALA. STAT. §32-5B-5. If a violation of state law requires a federal constitutional remedy, then Alabama's rule would create direct conflicts with the Court's precedents allowing the search of an automobile's passenger compartment incident to a constitutional arrest. *See, e.g., Thornton*, 541 U.S., at 623-24; *New York* v. *Belton*, 453 U.S. 454, 462-63 (1981).

Louisiana law has a similar provision: "Probable cause for violation of this Section shall be based solely upon a law enforcement officer's clear and unobstructed view of a person not restrained as required by this Section. A law-enforcement officer may not search or inspect a motor vehicle, its contents, the driver, or a passenger solely because of a violation of this Section." LA. REV. STAT. §32:295.1(F). Thus, under Moore's proposed rule, the federal Constitution would give drivers in Louisiana more rights than drivers in Texas. Moreover, a driver observed without a seatbelt could not be searched incident to a lawful arrest, notwithstanding this Court's contrary decision in *Robinson*.

If the Constitution provides the remedy for a state-law violation, then violations of each of these state statutes would result in courts having to declare unconstitutional what this Court has expressly authorized. Evidence discovered by the police that would have been admissible under the Court's reading of the Constitution would now

be suppressed. If that is the rule, then the Arizona Legislature has reinterpreted *Atwater*; the Alabama Legislature has reinterpreted *Belton*; and the Louisiana Legislature has reinterpreted *Robinson*.

Federal constitutional rights should not vary from State to State. The Constitution provides a uniform standard for protecting citizens' rights against unreasonable searches and seizures. If States go beyond that minimum guaranteed protection as a matter of their own law, state law—not the Fourth Amendment—should provide the remedy.

2. The varied state-law approaches to misdemeanor arrests should—and often do—have state-crafted remedies.

State laws differ markedly in whether they allow an officer to effectuate a warrantless full custodial arrest for a misdemeanor committed in his presence, even though such an arrest does not fall short of the minimum standard required by the Constitution. *See Atwater*, 453 U.S., at 354.[6] Many of the jurisdictions that have

---

6. Many jurisdictions have chosen to limit warrantless misdemeanor arrests. *See, e.g.*, KAN. STAT.§22-2401(d) (prohibiting arrest for minor traffic violation committed in officer's view); KY. REV. STAT. §§431.015(1), (2) (forbidding arrest for certain misdemeanors committed in the officer's presence); LA. REV. STAT. §32:391 (providing for the issuance of a summons); MD. TRANSP. CODE §26-202 (enumerating limited grounds for warrantless arrest); OR. REV. STAT. §810.401(3)(a) (prohibiting arrest for a traffic violation); MINN. R. CRIM. PROC. 6.01, subd. 1(1)(a) (mandating citation for misdemeanors); S.D. Codified Laws §32-33-2 (providing for summons); TENN. CODE §40-7-118(b)(1) (requiring citation rather than custodial arrest for certain offenses); TEX. TRANSP. CODE §543.004(a)(1) (providing for a "written notice to appear" for speeding or violating the open container

exceeded that minimum have also provided a corresponding state-law remedy.

In Alabama, for example, state law instructs officers to issue a citation for a misdemeanor traffic violation and then release the arrestee on bond. ALA. CODE §32-1-4(a)-(b). Alabama law also provides its own remedy: an officer failing to follow the guidelines "shall be guilty of misconduct in office and shall be subject to removal from office." *Id.* §32-1-4(c). Applying Moore's proposed rule to constitutionalize the violation of Alabama state law would require an increase in the remedy beyond that which the Alabama Legislature has provided.

Similarly, the California Vehicle Code requires officers to release certain arrestees upon a written promise to appear in court. CAL. VEH. CODE §40504. Using the exclusionary rule as a remedy, however, is the last resort under California law. Proposition 8, which amended Article I, section 28(d) of the California Constitution, "forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution

---

law); VA. CODE §46.2-936 (requiring a summons for misdemeanor arrests).

Other States permit warrantless arrest for minor offenses observed by the officer, but only under specific circumstances. *See, e.g.*, ALA. CODE §32-1-4(a)-(b) (allowing citation and release); CAL. VEH. CODE §40504 (allowing citation and release); CAL. PENAL CODE §853.6(i) (enumerating exceptions to the cite-and-release rule).

Still others generally allow warrantless arrest for misdemeanors committed in the presence of the officer. *See, e.g.*, D.C. CODE §23-581(a)(1)(iv); NEB. REV. STAT. §29-404.02(1)(b)(4); VT. R. CRIM. P. 3(b); WYO. STAT. ANN. §7-2-102(b)(i).

as interpreted by the United States Supreme Court." *People* v. *McKay*, 41 P.3d 59 (Cal. 2002). "[But] Proposition 8 left intact the substantive scope of state statutory and constitutional rights against arrest for minor offenses. Violation of those rights exposes the peace officers and their departments to civil actions seeking injunctive or other relief. Violation of those state rights also may subject the offending officer to an internal investigation, additional training, and departmental discipline." *Id.*, at 71–72 (citations omitted). Citizens of California expressly intended that the exclusionary rule not be the remedy for every state-law violation. Moore's proposed rule would directly contravene that intent.

Significantly, States regularly differentiate between a constitutionally valid and a statutorily valid arrest. In *McKay*, for example, the court concluded "that so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment." 41 P.3d, at 71. Similarly, the Maine Supreme Judicial Court and the Ohio Supreme Court both refused to apply the exclusionary rule where an officer violated a state-arrest statute, but had constitutional probable cause to arrest. *State* v. *Jolin*, 639 A.2d 1062, 1064 (Me. 1994); *City of Kettering* v. *Hollen*, 416 N.E.2d 598, 600 (Ohio 1980) ("[T]he exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights.").

IV. THE PROBABLE RESULT OF MOORE'S PROPOSED RULE WOULD BE *LESS* PROTECTION FOR INDIVIDUALS THAN IS CURRENTLY PROVIDED BY THE STATES.

Moore might argue that the Virigina Court's approach should be followed in order to provide the maximum protection to those arrested in violation of state law. But, in all probability, the opposite is true. Unless the States are free to craft their own remedies for arrests that violate state law without contravening the Fourth Amendment, they may well cease to provide such protections.

The Fourth Amendment provides both protection to individuals (a "floor" of rights that state action may not fall below) and a remedy for its violation (often—but not always—the exclusion of evidence). Critically, the protection offered by the Fourth Amendment is not the freedom from arrest, nor the freedom from search. Rather, it is the freedom from *unreasonable* search. U.S. CONST. amend. IV; *see United States* v. *Knights*, 534 U.S. 112, 118 (2001) (explaining that "the ultimate touchstone of the Fourth Amendment is 'reasonableness'"). With few exceptions, the reasonableness of a search "is not in doubt where the search or seizure is based upon probable cause." *Whren*, 517 U.S., at 817. And the arrest for minor traffic violations is permitted by the Fourth Amendment. *See Atwater*, 532 U.S., at 354-55.

As to remedies, the Court has explained that the "[s]uppression of evidence is our last resort, not our first impulse." *Hudson*, 126 S.Ct., at 2163. "Whether the exclusionary sanction is appropriately imposed in a particular case, is an issue separate from the question whether the Fourth Amendment rights of the party

seeking to invoke the rule were violated by police conduct." *Id.* (internal quotations omitted). Thus, even for Fourth Amendment violations, the exclusion of evidence is a "massive remedy." *Id.*, at 2166.

It is against this backdrop that States are free to provide their citizens with protections in addition to those afforded by the Framers in adopting the Fourth Amendment. Virginia has done just that by generally prohibiting arrest for Class 1 and 2 misdemeanors. *See* VA. CODE §19.2-74. Other States have likewise enacted statutes prohibiting or limiting arrest for a variety of minor crimes. *See generally* Part III, *supra*. But these protections have been enacted under the generally prevailing view that the violation of these *state statutory* protections does not create a *federal constitutional* violation requiring the drastic remedy of the exclusion of evidence. Should the Court hold here that any violation of one of these state statutes creates a Fourth Amendment claim upon which an arrestee may obtain the exclusion of evidence, the States will have significant incentive to eliminate protections above those mandated by the Fourth Amendment. *See United States* v. *Caceres*, 440 U.S. 741, 755-56 (1979) ("[W]e cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures . . . . [T]he result might well be fewer and less protective regulations."); *cf. Atwater*, 532 U.S., at 352 ("It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical

consideration without having to subsume it under a broader principle.").

The melding of state-law regulations into federal constitutional rights undermines the benefits of both: On the one hand, it mandates a uniform remedy for a broad spectrum of state statutory violations; on the other, it allows state laws to create variations in federal constitutional protections.

The Fourth Amendment cannot be defined by state statute. Rather, States should assume the responsibility for enforcing their own laws. As such, declining to enforce a mandatory exclusionary remedy for all state-law violations maintains both the need for state sovereignty in enforcing state laws and the need for uniformity in the enforcement of federal rights.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Virginia Supreme Court.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney Genera

ERIC J.R. Nichols
Deputy Attorney General fo
Criminal Justice

R. TED CRUZ
Solicitor General
Counsel of Record

SUSANNA DOKUPIL
ADAM W. ASTON
Assistant Solicitors General

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

November 2007